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No. 80-1446

In the Supreme Court of the United States

OCTOBER TERM, 1980

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IRENE LAVIN,

Petitioner,

v.

COMMITTEE OF BAR EXAMINERS OF THE STATE BAR OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Each of the contentions presented by respondent Committee of Bar Examiners' Brief in Opposition to the Petition for Writ of Certiorari is adequately refuted by the Petition, with one exception. The exception arises because of a factual inaccuracy in the Brief in Opposition. This Reply Brief addresses that factual misstatement.

RESPONDENT MAY NOT RELY ON PETITIONER'S PRIOR KNOWLEDGE OF RESPONDENT'S DISCRIMINATORY GRADING RULES BECAUSE PETITIONER HAD NO SUCH KNOWLEDGE.

Respondent Committee argues the discriminatory grading rules applied to California's bar examination did not deprive petitioner of equal protection because she chose to take the examination in two parts, knowing of the different grading standards. Respondent Committee states:

> "Petitioner makes no claim that she was unaware of the Committee's standards nor that she was misled by the Committee." (Resp. Br. in Opp., p. 11.)

(Similar suggestions that petitioner was aware of the discriminatory grading rules are found at pages 7-8, 10-11 and 16-18 of Respondent's Brief in Opposition.)

These assertions and suggestions are flatly incorrect, as respondent Committee should be aware. Actually, petitioner had no knowledge prior to taking only the essay portion of the spring 1980 bar examination that discriminatory grading rules would be applied to those exercising such an option. Petitioner never received a copy of the 1979 notice concerning the differing rules and, in fact, was orally advised by a representative of the Committee that no penalties would be applied to applicants taking the examination in two parts.

Petitioner alleged the latter facts at page 7, lines 13-17, of her original petition to respondent Committee. That petition also specifically stated as follows:

> "As the [Committee's] instructions signed and dated November 17, 1979 referred to passing the examination in sections, petitioner telephoned the Los Angeles office of the Committee of Bar Examiners to inquire as to the

possible penalties which [might] be incurred if one elected to take the examination in sections. Positive assurances were received that there would be no detriment of any type, if such an election resulted." (Petn. to Comm., p. 5, lines 23-27.)

". . . . Believing in all good faith, that the information received was accurate, the petitioner justifiably relied on that information. In this circumstance, the petitioner received no other information from any source regarding the grading of the examination." (Petn. to Comm., p. 6, lines 3-6.)

Petitioner reiterated these facts in a letter seeking reconsideration of the Committee's ruling denying her original petition, as follows:

". . . . In November, 1979, she was informed she had passed the MBE [Multistate Bar Examination] with a score of 437, and could, if she so desired, repeat only the essay part of the bar examination. She was given no notice that her fall 1979 MBE score would not be used in calculating her total points on the spring 1980 examination. In fact, she was told by an employee of the Committee that she could take the essay part only, *without suffering any penalty* for not taking the combined examination. In reliance upon the representation made by the Committee's agent, and because the Committee gave no contrary notice, Ms. Lavin opted to take only the spring 1980 essay examination. . . ." (July 3, 1980 letter from petitioner to respondent

Committee, p. 2; emphasis in original.)[1]

Since petitioner was not aware of the discriminatory grading rules applicable to those who took the examination in two sections, respondent may not oppose her equal protection contentions on the basis of her prior knowledge of such rules.

Furthermore, even if petitioner had known of the discriminatory grading rules, a denial of equal protection should not be excused on the ground that the victim of the discrimination was aware in advance that it would occur. Petitioner is aware of no authority and respondent Committee cites none to the effect that prior knowledge would permit an equal protection waiver in these circumstances.[2]

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[1] Petitioner's original petition to respondent Committee and her July 3, 1980 letter were not incorporated into the California Supreme Court's record in this case and are therefore not part of the record certified to this Court. However, both respondent Committee and petitioner have copies of these documents in their files.

Petitioner did not recite these facts in her petition to this Court because the facts were not in the certified record. Nevertheless, petitioner is compelled to do so in this Reply Brief because of the factual misstatements in Respondent's Brief in Opposition.

Respondent's reference (at pages 7-8 and 10-11 of its Opposition) to Exhibit A of petitioner's petition to the California Supreme Court is misleading. That exhibit was a copy of respondent Committee's 1979 notice describing the differing grading rules to be applied to applicants taking the bar examination in separate sessions. The document was attached to the petition to the California Supreme Court as an illustration of the discriminatory grading rules. That petition did not allege petitioner had received such a document prior to taking the spring 1980 bar examination and, as stated above, petitioner had in fact never received such a document prior to taking the latter examination.

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[2] Respondent's suggestion that a waiver of equal protection occurred here provides a separate issue worthy of consideration by this Court on a writ of certiorari.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Petition for Writ of Certiorari, petitioner respectfully requests that a writ of certiorari issue and that the discriminatory grading rules applied to California's general bar examination be declared unconstitutional.

Respectfully submitted,

EDWARD J. HOROWITZ,
A Professional Corporation

By EDWARD J. HOROWITZ
Attorney for Petitioner

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 3340 Ocean Park Boulevard, Suite 3005, Santa Monica, California 90405: that on April 17, 1981, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Monica, California, addressed as follows:

Clerk, U.S. Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Hand delivered; forty copies)

Clerk, California Supreme Court
350 McAllister Street, Room 4050
San Francisco, California 94102

Herbert M. Rosenthal
Truitt A. Richey, Jr.
State Bar of California
555 Franklin Street
San Francisco, California 94102

Robert M. Sweet
State Bar of California
1230 West Third Street
Los Angeles, California 90017

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 17, 1981 at Santa Monica, California.

Kirk W. Harney
(Original signed)